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THE

AMERICAN LAW REGISTER.

JULY, 1860.

THE ADOPTION OF THE PRINCIPLES OF EQUITY JURISPRUDENCE INTO THE ADMINISTRATION OF THE COMMON LAW.

FIRST ARTICLE.

A proper examination of the extent to which the principles governing the decisions, and regulating the practice of those tribunals of our municipal law known as *Courts of Equity, or Chancery*, have been introduced, received and adopted as modifications, additions and improvements of the system of justice administered in that more ancient and more extensive division of the jurisprudence of England and the United States, designated as the *common law*, would lead to a survey and consideration of most of the prominent doctrines and rules appertaining to each of the three general heads of equity jurisdiction, the concurrent, the exclusive, and the ancillary. It would be necessary to consider the doctrines of that part of its jurisdiction which is concurrent with the exercise of similar powers on the part of courts of law, because many of these equitable principles and rules, for the sake of their greater convenience, simplicity and justice, have been adopted by courts of law, in order to effect more completely objects which they could previously obtain only partially and imperfectly.

It would be of importance to examine the principles and pre-

cepts controlling the exercise of the jurisdiction which courts of equity have at any time possessed exclusively, since in many instances it would be found that courts of law have endeavored to exercise a similar jurisdiction, and to give remedies which they never before afforded, adopting in so doing the doctrines and rules of the tribunals which they imitated.

And it would also be necessary to consider the modes of proceeding adopted by courts of equity, for the purpose of aiding and assisting the administration of justice in courts of law, since it might appear that legal tribunals have been able to furnish to their suitors, in many cases previously requiring this foreign assistance, the whole relief desired; and to dispense with a resort to the ancillary jurisdiction of another tribunal.

Such an examination of the body of chancery law, together with a careful comparison of every part thereof, with the corresponding principles of the common law in relation to the same subject matters, would result in an exposition of the real difference between those principles, would also bring to view all their resemblances, and be the means of disclosing many interchanges of rules and doctrines, more especially displaying the great extent to which the mild and liberal principles of equity have pervaded the administration of common law, varying from a complete usurpation of power over many subject matters of jurisdiction, down to the slightest and almost imperceptible shades of influence over methods and manners of reasoning and practice.

So thorough and exhaustive an examination and exposition of the interchanging relations which the principles of equity and law have borne to each other, is not, however, within the limits of a treatise like the present. Our prescribed object will be, perhaps, fully attained if we are able to seize upon the more prominent instances of the reception and adoption of the peculiar principles of equity, into the practice of the tribunals of the law, and to present to view some of the most obvious and most extended effects which the introduction of those principles has produced, leaving a more complete examination, and the detection of less evident influences and closer analogies, to a more extensive treatise.

MORTGAGES.—Perhaps the most striking instance of the introduction of purely equitable principles into the administration of the common law, is to be found in viewing the law in relation to mortgages of real property, as it exists at the present day, and comparing it with the condition of the law as it existed at and before the time of Lord Coke.

At their first inception, mortgages were in fact what they now are in form, actual conveyances of the whole legal estate, with a condition that the feoffments should become void upon the payment of a certain sum of money, or the performance of some agreement at a time specified, which condition being performed, the estate revested in its former owner.[1] If the condition was not literally complied with, according to the strict rules of law by which the construction of all conditions that were to defeat or divest estates was governed, the ownership became complete in the mortgagee, and was absolutely and forever gone from the mortgagor.[2]

To such an extent was this strictness of construction carried, that in a case where a mortgagee's representatives consented to receive less than the sum due, in satisfaction of the mortgage, and it was agreed "that yet in appearance for the better performance of the condition the whole sum should be paid," and that the residue above the amount of the debt, as agreed to be reduced, should be repaid, which agreement was performed, and the representatives of the mortgagor entered upon the land, which in the meantime had been transferred from the mortgagee, by divers mesne conveyances, to a third person; yet it was held by the whole court of King's Bench, affirmed on a writ of error in the Exchequer, and therefore decided by all the judges of England, that this "was not any performance of the condition, because an estate of inheritance was, by the payment of the said money, to be divested, and therefore the condition should be performed by a true and effectual payment, and not by a shadow or color of payment."[3] And it would appear, that if the condition was not performed at the day and in the manner prescribed, no subsequent performance, although accepted and its

[1] 2 Gr. Cruise, 65, § 3, 4, 5. [2] Ibid.
[3] Goodall's Case, 5 Coke, 95.

benefit received by the mortgagee, could divest the estate, which, having now become an absolute fee simple in the mortgagee, could not be reconveyed, except by the same ceremonies necessary to an original feoffment.[1]

This strictness, although perhaps warranted by the terms of the instruments and the condition of the common law at that day, yet, being entirely contrary to the real intent of the parties to such engagements, and not in accordance with any true principle of justice, was, as may be supposed, regarded with any thing but favor by all who were not blinded by professional prejudice, or a devout attachment to form and precedent, but were able to perceive the true nature and meaning of the contract, and that every conveyance of this nature was intended but for a security, whose operation was sufficient when that object was fully and completely accomplished, without the necessity of an inevitable forfeiture upon the slightest failure of the exact performance of the condition.[2]

Lands mortgaged being thus evidently intended only as security for the money borrowed, or for the performance of the conditions stated, the absolute loss of the estate, upon a failure to perform in the manner indicated, came soon to be considered as in the nature of a forfeiture, against which courts of chancery had already taken jurisdicion to relieve, and the principle was accordingly adopted in equity, that although upon the non-performance of the condition, the estate became absolute at law in the mortgagee, yet that the mortgagor should still be entitled to a right to redeem his estate by payment of the money with interests and costs, or the performance of the condition and payment of damages, if this right were exer-

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[1] 2 Gr. Cruise, 65, § 6; Wade's Case, 5 Coke, 114.

[2] As illustrating the odium with which persons outside of the legal profession were accustomed to regard such strict forfeitures of lands mortgaged, Shakspeare's play of the *Merchant of Venice* may be referred to, and also the following passage from *Beaumont* and *Fletcher*:

Alathe.—Thou hast undone a faithful gentleman
By taking forfeit of his land.

Algripe.—I do confess, I will henceforth practice repentance.
I will restore *all mortgages*, forswear abominable usury.

cised within a reasonable time.[1] This method of proceeding could be no injury to the creditor, since he would be most amply secured, and it effectuated completely the actual and full intent of the parties. In accordance with this principle, courts of equity entertained bills for relief and the redemption of mortgages, after the forfeiture had accrued; and upon the satisfaction, or offer of satisfaction by the mortgagor, would decree a redemption, and the execution of all releases and conveyances necessary for the confirmation and reconveyance of the legal estate to the mortgagor on those entitled under him.[2]

The full and complete operation of this principle was not established even in equity without some difficulty and delay; and although, in cases arising between the parties to the mortgage, the conveyance was treated simply as a security, yet for a time the legal titles acquired upon a forfeiture by other persons, such as a right of dower in the wife of the mortgagee, or the title of the king or other lord of the fee, in case of the death of the mortgagee without heirs, or his commission of acts creating a forfeiture of his lands and goods, could not be disturbed.[3] The increasing power of courts of equity, however, soon enabled them to put their equitable principle in relation to mortgages into the fullest operation,[4] in which utmost vigor it has always continued the pole-star of equity jurisdiction which has ever guided, directed, and controlled its doctrines, practices, and remedies, being the principle that a mortgage is but a security for the debt, to be allowed by no possibility to operate in any other way or to any greater extent.[5]

It is very evident that the difference thus arising between the construction adopted by courts of law and that of courts of equity, in relation to mortgages, the former treating them, as we have

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[1] 2 Gr. Cruise, 66, § 8.

[2] Emanuel College *vs.* Evans, 1 Chancery Reports, 11; Com. Dig. Chancery, 4, 5, and 1; 1 Fonbl. Eq. B. 3, ch. 1, § 13; 2 Story's Eq. Jur. § 1013–14; Seton *vs.* Slade, 7 Vesey, 274.

[3] Bac. Abr., Mortgage, and Butler's note to Co. Litt. 204 b.

[4] 2 Gr. Cruise, 67, § 10.

[5] 2 Gr. Cruise, 67, § 14, and note; 2 Story's Eq. Jur. § 1016.

already seen, precisely as conveyances upon condition, to which the incidents of estates upon condition were to be strictly annexed, while the latter courts regarded them according to their true intent, as mere securities; must have led to a considerable degree of antagonism between the two jurisdictions, and been productive of the greatest inconveniences. If courts of law upon the non-performance of the condition of a mortgage, considered the property as absolutely in the mortgagee in fee simple, and thereupon allowed it to be taken in execution for his debts, to be subject to the dower of his wife, and made it liable to be forfeited upon the commission of felonies by him, and to escheat to the lord of the fee, upon his death without heirs; and if these courts refused to listen to any suggestions of equitable principles of relief, to prevent such occurrences; it is obvious that courts of equity would be continually employed in relieving against rules of law, and decreeing the execution of instruments and conveyances necessary to carry out and establish their own principles and doctrines, in such a manner that in accordance therewith legal estates might be created, which must be recognized by courts of common law.

The refusal on the part of legal tribunals to recognize the established principles of equity in relation to mortgages, did not exist (as in many instances very properly might have been, and now is the case,) because those principles were such as could only be adopted by courts having powers of enforcing them, similar to those possessed only by equity tribunals, which powers not being within the exercise of courts of law, compelled them to ignore and reject all the equitable estates and interests created by the Court of Chancery, upon the principle that the law recognizes no right to which it cannot apply a remedy. It was rather because the terms and forms of the conveyances in mortgage had a defined legal meaning and effect, which prevented the minds of common law judges and lawyers, from looking through the technical construction of the conveyance, and kept them from perceiving and declaring that though in form a feoffment upon condition it was really and truly but a security for money due, or for a contract to be performed.

As is generally the case, however, when there is an opposition of technical rules and reasons to the exercise of evident principles of natural and municipal justice, courts of law were before long compelled, partly by statute and partly by the natural extent and pervading power of the doctrines maintained in equity, to depart somewhat from their ancient and established rules and constructions, and permit the introduction into the common law administration of justice, of principles which had long been propounded and adopted in courts of equity, and which could not long remain confined solely to one of these two great jurisdictions, exercising nearly equal powers, in a great degree commingling with each other, and governing and determining the whole rights of property of the same nation. The introduction of these equitable principles into the law, from its commencement to the present moment has been gradually and surely increasing in extent, until the case of mortgages has come to be considered emphatically "one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law."[1] The progress and extent of this change it is our province briefly to examine.

The effect of the rigorous doctrines of the courts of common law in considering mortgages as estates upon condition, was to withdraw actions upon such contracts almost entirely from the jurisdiction of those courts, except when resorted to by mortgagees for the purpose of procuring those advantages which could not be obtained in courts of equity, since those courts on the contrary would interfere to prevent the proceedings instituted at law. The jurisdiction of equity over the subject of mortgages became therefore almost as exclusive as in cases of trusts, and in this condition the law of mortgages remained for a considerable period, courts of law recognizing no such peculiar conveyances as deeds of mortgage, distinguished from estates upon condition liable to be divested upon a strict performance of the conditions upon which the estates were to

[1] 4 Kent's Com. Lect. 58.

terminate, and subject to be defeated in no other way while courts of equity continued to increase and strengthen their jurisdiction, and to establish and construct, a well defined system of rules for the determination of all the various questions arising concerning mortgaged estates, in accordance with their peculiar principle that a mortgage although a security of a peculiar nature, is no more than a security.

About the year 1734 the inconveniences arising from the existence of different doctrines, and systems of rules in the different jurisdictions, became so burdensome, that in that year, the seventh of the reign of *George the Second*, an act of Parliament was passed,[1] providing that whenever actions were brought upon mortgages, if any persons who were, or might appear and become defendants to such suit, should at any time pending such action pay to the mortgagee or his representatives, or in case of their refusal to accept, should bring into court, the principal moneys due upon the mortgage, with interest thereon, and such costs as the court might determine, such moneys should be deemed and taken to be in full satisfaction and discharge of the mortgage, and by rules of court the mortgagees should be compelled to assign and reconvey the lands and property mortgaged, and deliver up all title deeds in their custody relating to such lands. This act, in its terms, applies to all actions brought upon mortgages, before or after the breach of the condition, although referring in the preamble to actions brought for the purpose of foreclosure. Its effect being to stay proceedings at law, and give in a majority of cases as effectual relief as could be afforded in equity; this change of the law, a statute introduction of equity principles, rather than their gradual encroachment on account of their adaptation to the demands of justice, seems to have been the first manifestion of an entrance through which the purer and more just doctrines of equity upon this subject, were eventually to pass to such a great extent into the administration of the common law; although in this, as in most cases where a gradual change has been effected in principles of the law relating to real property,

[1] Statutes at Large, 7 Geo. 2, ch. 20.

the actual commencement of the movement is obscure and not to be exactly determined. It was natural that the power given by this statute to courts of law, to exercise in an effectual manner much of the jurisdiction which courts of equity previously exclusively possessed, should become a starting point for the progressive, gradual and easy introduction of many of the prominent principles of equity, connected with and dependent upon the exercise of the power thus conferred. We find courts and judges very soon beginning to hold language concerning mortgages, such as had previously been unknown in any other than equity tribunals; asserting "that a mortgage, notwithstanding the form, was but a chattel, and the mortgage is only security, and it is an affront to common sense to say the mortgagor is not the real owner;"[1] and also affirming that "although a mortgage is in form a conveyance of the legal estate, yet neither courts of law or equity lose sight of what the parties intended."[2]

The extent to which the principles thus hinted at by courts of law, as above stated, that, except so far as the relative rights of the parties to the conveyance are concerned, and in relation to all strangers and third parties, until the entry of the mortgagee for breach of the condition, and in many respects until final absolute foreclosure, the mortgagor is to all intents and purposes the owner of the land, subject merely to the *lien* of the mortgagee, has been established among the fundamentals of the common law in relation to mortgages, may be ascertained to the best practical advantage by a consideration of the present state of the law in America, where the progress of equitable principles in pervading every department of jurisprudence, has outstripped that of England, whose courts have, not apparently, advanced beyond a recognition of those principles which were absolutely necessary to the proper enforcement of the statute of *George the Second.*"[3]

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[1] Per Lord Mansfield, J., Douglas, 631.

[2] King *vs.* Inhabitants of Eddington, 1 East, 288.

[3] Dixon *vs.* Wigram, 2 Cromp. & Jer., 613; Smeeton *vs.* Collier, 5 Dowl. & Lowndes, 184.

A mortgage then, in form, is a conveyance of the legal estate to the mortgagee, and if he chooses to exercise the right, and there is no agreement to the contrary, he may immediately enter and take possession of the land.[1] But if there be an express contract that until default the mortgagor shall remain in possession, the mortgagee cannot enter before default, and if he does, the mortgagor can maintain trespass against him.[2] And in the absence of any express contract to this effect, it has been suggested that such an agreement might be implied from the fact of the mortgagor being permitted, for a length of time, to remain in possession of the premises.[3]

Before any such entry, or an equivalent assertion of his title on the part of the mortgagee in some other mode, his interest under the mortgage does not constitute any estate in the land. He has no interest which can be taken by his creditors,[4] nor any title to the rents or profits,[5] nor any interest in the land which he can convey without an assignment of the debt secured by the mortgage;[6] nor will an assignment of the mortgage deed, without a transfer of the debt, convey anything. The land will not pass by the mortgagee's will of real estate, nor will his widow be entitled to dower therein, unless the mortgage is fully foreclosed.[7] Upon the death of the mortgagee, the interest in the mortgage descends, not to his heirs, but to his personal representatives, who may maintain a writ of entry in their own names, to recover the land; and a payment of the money to the heirs, will not be an effectual payment to discharge the mortgage.[8]

On the other hand, the *mortgagor* is regarded as having a fee

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[1] Reed *vs.* Davis, 4 Pick. 46; 4 Kent, 164.

[2] Runyan *vs.* Mesereau, 11 Johns. 534.

[3] Stowell *vs.* Pike, 2 Greenl. 387; Hartshorne *vs.* Hubbard, 2 N. H. 453: Jackson *vs.* Hopkins, 18 Johns. 488.

[4] Kelley *vs.* Burnham, 9 N. H. 20.

[5] 4 Kent, 155.

[6] Aymer *vs.* Bill, 5 Johns. C. R. 570.

[7] Ballard *vs.* Carter, 5 Pick. 112; Duke of Leeds *vs.* Munday, 3 Ves. 348.

[8] Smith *vs.* Dyer, 16 Mass.; Scott *vs.* McFarland, 13 Mass. 309; Runyan *vs.* Mesereau, 11 Johns, 534.

simple in the land; his estate is liable to seizure and a total sale upon execution, subject, of course, to the payment of the debt secured by the mortgage; he is entitled to the rents and profits, and takes them in his own right, and can convey the land, but not without a deed, since his interest is an estate in the property.[1] His interest is real estate within the meaning of statutes providing modes in which settlements and citizenship may be obtained in towns and cities;[2] it may be devised by him; upon his death it descends to his heirs,[3] and his widow is entitled to dower therein.[4]

And as further evidence that the mortgagee's right, until asserted by entry or action, is but a chattel, and not an estate in the land, it appears that when a mortgagee transfers his interest in the debt secured by the mortgage, to another person, he ceases to have any control over the mortgage;[5] the assignment of the debt carries with it the mortgage, so as to enable the assignee to maintain an action in equity, and in most cases at law, in his own name, upon the mortgage;[6] and if a person having an interest to protect, pays the money due upon the mortgage debt, he becomes in equity and upon the weight of authority, in law also, the assignee of the mortgage, and entitled to the benefit of it until the debt is repaid him, although the mortgage is in form cancelled or discharged, the transaction, in order to effect the substantial justice of the case, being considered as a discharge or assignment of the mortgage, as the interest of the party may require.[7] In one State, these principles have been carried so far, that where an assignment of an unnegotiable note, secured by mortgage, was made, it was held that this transferred the interest in the mortgage to the assignee, so as to entitle him to maintain a writ of entry in his own name thereupon, although he could not sue upon the debt itself except in the name

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[1] Scott *vs.* McFarland, 13 Mass. 309. [2] New London *vs.* Sutton, 2 N. H. 401.

[3] Smith *vs.* Manning, 9 Mass. 422.

[4] Coles *vs.* Coles, 15 Johns. 319; Collins *vs.* Torrey, 6 Pick. 416; Gibson *vs.* Crehore, 15 Mass. 278. [5] Cutler *vs.* Haven, 8 Pick. 490.

[6] Roberts on Frauds, 275; Jackson *vs.* Blodgett, 5 Conn. 202; Green *vs.* Hart, 1 Johns. 580.

[7] Starr *vs.* Ellis, 6 Johns. C. R. 305; Robinson *vs.* Leavitt, 7 N. H. 100.

of the assignor, and therefore in a real action brought in the name of the assignor, upon the mortgage, for the benefit of the assignee, judgment was given for the defendant, because of the improper plaintiff.[1] And further, the interest in the mortgage is not within the statute of frauds, as it is only a mere incident to the debt and inseparable from it; and in many States, upon payment or tender of payment of the mortgage money, whether before or after condition broken, the mortgagee's title is extinguished, and the unincumbered interest in the land re-vests in the mortgagor, by mere operation of law, without a reconveyance or discharge of any kind.[2]

But, although the principle that a mortgage is only a security for the debt specified in its condition, has been so fully adopted, and although a mortgage is, in general, "now viewed in a court of law in the same light as in a court of equity," nevertheless, a mortgage is a security of a peculiar nature, and must be distinguished from all other securities. It is executed with all the formalities necessary to a conveyance of real estate, in order that the mortgagee, if he desires, may make it operate as a transfer of the title to the land, and place himself in possession of the estate. It is a "potential conveyance" of the legal title, and whenever the mortgagee sees fit to exercise his rights under the conveyance, he may enter upon the land, and will be considered as seized for all purposes necessary to the maintenance of his legal rights.[3] When thus properly entered he can remain, taking the rents and profits of the land, until the mortgage debt is paid. Upon a redemption, however, he is liable to account for the rents and profits received during his possession, and he cannot foreclose and obtain the absolute title, although in actual possession, without giving express notice to the mortgagor that he holds for that purpose.

Such is a brief statement of the effect of a mortgage, and the relations of the parties to such instruments as generally established

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[1] Rigney *vs.* Lovejoy, 13 N. Hamp. Reps. 253.

[2] Porter *vs.* Millett, 9 Mass. 101; Jackson *vs.* Stackhouse, 1 Conn. 122; Sweet *vs.* Horn, 3 Mason, 520.

[3] Rigney *vs.* Lovejoy, 13 N. H. 253.

in the courts of this country. A more thorough examination of the law as actually administered, and a comparison of it with the ancient rules, would serve to show that all the changes which have been successively adopted have been made only with the view of preserving and effectuating the actual and just intentions and objects of the parties to the contract, which obvious and most desirable end is, under the present system, more fully attained than at any time heretofore.

RECENT AMERICAN DECISIONS.

In the Southern District of Alabama.—Spring Term, 1860.

THE UNITED STATES *vs.* HORATIO N. GOULD.
THE UNITED STATES *vs.* T. V. BRODNAX.

1. Congress has the Constitutional power to prohibit the foreign slave trade.
2. That power is part of the power to regulate foreign commerce. It is commercial in its character, and has the same extent and application, and the same limits, as the power to regulate foreign commerce.
3. The several States have the general sovereign right, to determine who may or who may not live within their limits, to fix the political and social status of each inhabitant, and to prescribe his rights and punish their violation within its limits.
4. This portion of State sovereignty has not been wholly surrendered to the General Government. It is surrendered only to the extent and for the purposes specified by the Constitution. As respects negroes, imported as slaves, it is surrendered only so far as to allow the prohibition of such importation, and as a means to this, the removal of negroes unlawfully imported. The power to prescribe and to protect the rights of such negroes, after the importation is entirely complete and ended, and they have become mingled with the mass of the population of a State, is exclusively in the State Government.
5. It is settled, by repeated decisions of the Supreme Court, that the commercial power of the General Government extends to and covers (exclusively of the interference of State laws,) the importation of either goods or persons, until the commercial transaction of importation is complete and ended, and no further. When the goods or persons imported pass out of the possession or control of the importer, his agents and employees, and become mingled with the mass of property or population of a State, they then become subject to the State jurisdiction and laws.